IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 245 (see No. 239)
247

IRWIN STEINGUT and HAROLD E. BLODGETT, as Receivers of the Assets in New York of Russo-Asiatic Bank,

Petitioners,

against

GUARANTY TRUST COMPANY OF NEW YORK, JAMES A. TILLMAN, JESSE C. MILLARD and UNITED STATES OF AMERICA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

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August 1, 1947.

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To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners, Irwin Steingut and Harold E. Blodgett, as Receivers of the assets in New York of Russo-Asiatic Bank (hereinafter sometimes called the Receivers), respectfully pray for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit to review a judgment of that Court, entered May 7, 1947, affirming a judgment of the United States District Court for the Southern District of New York, entered March 21, 1945, dismissing petitioners' complaint herein. A cer-

tified transcript of the record in this case, including proceedings in said Circuit Court of Appeals, has been furnished in accordance with Rule 38, par. 1 of the Rules of this Court.

THE OPINIONS OF THE COURTS BELOW

The opinion of the United States District Court is reported in 58 F. Supp. 623 (1944). The opinion of the Second Circuit Court of Appeals, handed down on May 7, 1947 (R. 3562), is reported in 161 F. 2d 571 (1947).

JURISDICTION

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (43 STAT. 938 (1925), 28 U. S. C. § 347(a) (1940)). The date of the judgment of the Circuit Court of Appeals for the Second Circuit to be reviewed is May 7, 1947.

STATEMENT

This case involves primarily the effect of the Litvinov Assignment (Ex. 26, R. 3320-21) upon the rights of American and other non-Russian creditors of Russo-Asiatic Bank, a former Russian banking corporation (hereinafter called Russo-Asiatic), to enforce their claims against assets of Russo-Asiatic in the State of New York, through the medium of a receivership provided for by the laws of that State (New York Civil Practice Act, Section 977-b). It presents questions of importance which were left open for future determination by this Court in *United States* v. *Belmont*, 301 U. S. 324 (1937) and *United States* v. *Pink*, 315 U. S. 203 (1942).

Russo-Asiatic was a joint stock banking corporation organized under the laws of the Russian Empire in 1910. In addition to offices in European and Asiatic Russia, Russo-Asiatic maintained offices in France, Great Britain, China and Japan (R. 223).

In 1917, Russo-Asiatic maintained dollar deposit accounts with various banks in New York, including the respondent Guaranty Trust Company of New York (hereinafter called Guaranty). On December 27, 1917, the net credit balances in the dollar accounts of Russo-Asiatic at Petrograd, Moscow, Yousovka and Vladivostok* with Guaranty in New York aggregated $1,483,481.36. No part of such credit balances and no interest thereon since December 26, 1917, has been paid (R. 230-3).

Russo-Asiatic was "nationalized" in Russia pursuant to a series of decrees of the Soviet Government beginning December 27, 1917** (Exs. 2A, R. 2681; 2B, R. 3151; 2C, R. 3152; 2D, R. 2683; 2G, R. 2685; 2H, R. 2687; 2J, R. 3155; 2K, R. 2689; 2L, R. 3168). Unique among the Soviet nationalization decrees, the basic decree nationalizing banks provided for the assumption of liabilities as well as of assets.

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*Russo-Asiatic also maintained dollar accounts with Guaranty for its branches at Shanghai, Paris and Yokohama, the net credit balances in which aggregated, on December 27, 1917, $870,742.25. Between that date and April 19, 1927, however, such credit balances were withdrawn in the regular course of business by the respective branches of Russo-Asiatic continuing to do business outside of Soviet Russia (R. 233).

**Except where otherwise indicated, all dates mentioned herein are according to the American calendar rather than the Russian calendar, which, prior to February 1, 1918, was 13 days behind the American calendar.

The non-Russian branches of Russo-Asiatic, including branches in France, England, China and Japan, continued to do business until their respective liquidations in those countries in 1926 (R. 227).

This action was instituted on May 12, 1919, in the name and on behalf of Russo-Asiatic, to recover the funds of Russo-Asiatic on deposit with Guaranty. In 1938, the petitioners were, by a judgment of the Supreme Court of the State of New York, appointed permanent Receivers of the assets in New York of Russo-Asiatic, pursuant to Section 977-b of the New York Civil Practice Act (R. 564), and by order of the United States District Court for the Southern District of New York, dated July 29, 1939, were substituted as plaintiffs in the action (R. 229-30).

Among the claims of creditors of Russo-Asiatic filed with the Receivers, pursuant to the New York Statute, are claims of American nationals, Friede, Tillman and Manufacturers Trust Company and a claim by Millard as assignee of the Chinese Government (R. 249-50). The Friede claim is based upon a pre-nationalization contract for payment of dollars in New York out of Russo-Asiatic funds on deposit there (R. 560-1). The Millard claim is for moneys paid by the Chinese Government to Russo-Asiatic at Shanghai during the period from 1917 to 1926, for transmission to its London branch pursuant to the Chinese Reorganization Loan Agreement of 1913 (R. 557-60).

Prior to the Litvinov Assignment, attachment liens upon the funds in suit were acquired by Tillman on August 24, 1927, Millard on March 28, 1933, and Friede on September 25, 1933 (R. 249).

The United States Government, as assignee of the Government of Soviet Russia under the Litvinov Assignment,

instituted two actions, one in 1934 and one in 1937, to recover the same funds sought by the Receivers. Those two actions were consolidated with the Receivers' action for the purposes of trial and the three actions were tried together. The District Court held that the United States was entitled to the funds (R. 253-4) and the Second Circuit Court of Appeals affirmed on the opinion of the District Court (R. 3562).

The court below decided that the funds on deposit to the credit of Russo-Asiatic with Guaranty became the property of the Soviet Government in 1917 by virtue of the decree nationalizing Russian banks (R. 226); that upon diplomatic recognition by our Government of the Soviet Government in 1933, the Soviet decree was entitled to enforcement here "retrospectively to 1917" (R. 3075); that, therefore, when the Receivers were appointed, the funds on deposit with Guaranty had been the property of the Soviet Government since 1917 and were not the property of Russo-Asiatic (R. 3075-7); and that those funds became the property of the United States Government in 1933 by reason of the Litvinov Assignment (R. 3076).

QUESTIONS PRESENTED AND REASONS FOR GRANTING WRIT

1. The first question presented is whether the Litvinov Assignment deprived American nationals and other non-Russians of their rights under local law in respect of New York assets of a nationalized Russian corporation. In holding that it did, the court below has decided an important question of federal law which has not been, but should be, settled by this Court. *United States* v. *Belmont*, 301 U. S. 324, 332 (1937); *United States* v. *Pink*, 315 U. S. 203, 227 (1942).

2. The second question presented is whether rights acquired by attachment prior to the Litvinov Assignment by American and other non-Russian creditors of a nationalized Russian corporation, are superior to the rights of the United States under the Litvinov Assignment, either as "pre-existing infirmities" (*Guaranty Trust Co.* v. *United States,* 304 U. S. 126, 142 (1938)), or by express exclusion from the Assignment. In holding that they are not, the court below has decided an important question of federal law which has not been, but should be, settled by this Court.

3. The third question presented is whether receivers under Section 977-b of the New York Civil Practice Act are entitled to assert the rights of creditors whose claims have been filed in the receivership. In holding that they are not, the court below has decided an important question of local law in a way probably in conflict with applicable local decisions.

4. The fourth question presented is whether the Soviet decrees confiscating properties of Russian banks—as distinguished from those affecting insurance and other corporations—had extraterritorial effect upon bank deposits in New York of such banks. In holding that they did, and that by reason thereof the United States acquired title to such deposits under the Litvinov Assignment, the court below decided an important federal question (*United States* v. *Pink,* 315 U. S. 203, 217), which has not been, but should be, settled by this Court.

5. The fifth question presented is whether the Litvinov Assignment requires the nullification of the procedural and remedial provisions of a state law, Section 977-b of the New York Civil Practice Act, which, among other things,

regulates the procedure for the enforcement of the rights of all persons in respect of New York assets of dissolved foreign corporations. In holding that it does, the court below decided a federal question in a way probably in conflict with applicable decisions of this Court. *Clark* v. *Williard*, 294 U. S. 211 (1935); *United States* v. *Bank of New York and Trust Co.*, 296 U. S. 463 (1936); *Guaranty Trust Co.* v. *United States*, 304 U. S. 126 (1938).

WHEREFORE, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Second Circuit, sitting at New York, N. Y., commanding said Court to certify and send up to this Court, on a date to be designated, a full and complete transcript of the record and of all proceedings in the Circuit Court of Appeals in this case to the end that this case may be reviewed and determined by this Court; that the judgment of the Circuit Court of Appeals be reversed; and that your petitioners be granted such other and further relief as may seem proper.

IRWIN STEINGUT and HAROLD E. BLODGETT,
as Receivers of the Assets in New York of Russo-Asiatic Bank
by ALBERT R. CONNELLY
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Of Counsel.

August 1, 1947.

BRIEF IN SUPPORT OF PETITION

SPECIFICATION OF ERRORS

The Circuit Court of Appeals erred:

1. In holding that the Litvinov Assignment deprived American nationals and other non-Russians of their rights under local law in respect of the New York assets of Russo-Asiatic.

2. In refusing to hold that rights to the funds in suit which were acquired by attachment prior to the Litvinov Assignment by American and other non-Russian creditors of Russo-Asiatic, are superior to the rights of the United States under the Litvinov Assignment, either as "preexisting infirmities", or by express exclusion from the Assignment.

3. In holding that the petitioners, as receivers of the assets in New York of Russo-Asiatic under Section 977-b of the New York Civil Practice Act, are not entitled to assert in this action the rights of creditors of Russo-Asiatic whose claims have been filed in the receivership.

4. In holding that the Soviet decrees nationalizing banks operated to vest title to Russo-Asiatic's deposits with Guaranty in New York in the Soviet Government and, by assignment, in the United States.

5. In holding that the Litvinov Assignment requires the nullification of the procedural and remedial provisions of Section 977-b of the New York Civil Practice Act.

6. In affirming the judgment of the District Court dismissing the petitioners' complaint.

ARGUMENT

Introductory

The decision of the court below denying recovery to the Receivers and holding that the United States acquired paramount title to the funds in suit under the Litvinov Assignment, was predicated wholly upon the interpretation of national policy announced by this Court in *United States* v. *Pink*, 315 U. S. 203 (1942).* Every other question in this case, including the attack made by Guaranty upon the status of the petitioners as receivers under Section 977-b of the New York Civil Practice Act and the validity of the legislation under which they were appointed, was determined in favor of the petitioners.

In the *Pink* case, the United States, as assignee of the Soviet Government under the Litvinov Assignment, was held to be entitled to recover the assets of the New York branch of First Russian Insurance Company which remained in the hands of the New York Superintendent of Insurance after all domestic creditors had been paid.

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*The rationale of the decision in the *Pink* case, as expressed in the majority opinion, was that the enforcement of the policy of the State of New York, denying extraterritorial effect to the confiscatory decrees of the Soviet Government "would collide with and subtract from the Federal policy", and would tend "to restore some of the precise irritants which have long affected the relations between these two great nations and which the policy of recognition was designed to eliminate" (315 U. S. at pp. 231, 232). It has been recognized that the "final settlement of claims and counterclaims" between the two governments and their nationals, to which the Litvinov Assignment was expressly stated to be "preparatory" (315 U. S. at p. 212) has become impossible of achievement. See Note, 29 Am. J. Int'l L. 290, 292; 2 Dep't. State Bull. 153, 154 (1940); and that it has otherwise failed of its purpose. See Bullitt, *The Great Globe Itself* (1946), 66-9.

Prior to that decision, the law of New York was clear, both before and after recognition of Soviet Russia, that New York would not give any effect to the nationalization decrees of the Soviet Government in so far as they purported to affect property located in New York. *Moscow Fire Ins. Co.* v. *Bank of New York,* 280 N. Y. 286 (1939), aff'd. without opinion, 309 U. S. 624 (1939), rehearing denied, 309 U. S. 697 (1939); *Petrogradsky M. K. Bank* v. *National City Bank,* 253 N. Y. 23 (1930); *James & Co.* v. *Second Russian Ins. Co.,* 239 N. Y. 248 (1925); *Vladikavkazky Ry. Co.* v. *New York Trust Co.,* 263 N. Y. 369 (1934). The Federal courts had held to the same effect. *Lehigh Valley R. Co.* v. *State of Russia,* 21 F. (2d) 396, 401 (C. C. A. 2d, 1927), cert. den. 275 U. S. 571 (1927); *United States* v. *Bank of New York & Trust Co.,* 10 F. Supp. 269 (S. D. N. Y., 1934), aff'd. 77 F. (2d) 866 (C. C. A. 2d, 1935), aff'd. 296 U. S. 463 (1936).

In fact, effect had been refused to the Soviet nationalization laws as to extraterritorial property not only in New York, but universally, both before and after recognition of Soviet Russia. See Nebolsine, "The Recovery of the Foreign Assets of Nationalized Russian Corporations", 39 Yale Law Journal 1130 (1930). Such treatment of the confiscatory decrees of Soviet Russia accorded with long-established principles applicable to confiscatory decrees of other nations. *Anderson* v. *N. V. Transadine Handelmaatschappij,* 289 N. Y. 9, 15 (1942); *Bollack* v. *Societe Generale,* 263 App. Div. 601, 603 (1st Dep't, 1942), leave to appeal to Court of Appeals denied, 264 App. Div. 767 (1st Dep't, 1942); *Banque Mellie Iran* v. *Yokohama Specie Bank,* 188 Misc. 346 (Sup. Ct. 1946).

The departure of the decision in the *Pink* case from established principles has been widely commented on:

> "The court has upset and parted with international law as heretofore understood, gravely impaired or weakened the protection to private property afforded by the Fifth Amendment of the United States Constitution, endowed a mere executive agreement by exchange of notes with the constitutional force of a formal treaty, misconstrued the agreement, and, it is respectfully submitted, confused that foreign policy of the United States in whose alleged support this revolutionary decision was thought necessary" [Borchard, *Extraterritorial Confiscations* 36 AM. J. INT'L L. 275 (1942)]

See also Jessup, "The Litvinov Assignment and the Pink Case", 36 *American Journal of International Law* 282 (1942); "Effect of Soviet Recognition upon Russian Confiscatory Decrees", 51 *Yale Law Journal* 848, 854 (1942) and "The Pink Case, the Recognition of Russia and the Litvinov Assignment", 30 *Georgetown Law Journal* 663, 673 (1942).

Whatever the merits of the decision in the *Pink* case, that decision left open major questions which are here presented for the first time, and which have acquired additional importance by reason of foreign legislation and events during World War II. See 16 Dept. State Bull. 1218 (1947) on Nationalization of industry in Rumania.

POINT I

THE CLAIMS OF AMERICAN NATIONALS AND OTHER NON-RUSSIAN CREDITORS OF RUSSO-ASIATIC ARE ENTITLED TO PROTECTION AGAINST THE EFFECT OF EXTRATERRITORIAL ENFORCEMENT OF THE SOVIET NATIONALIZATION DECREES.

One of the concurrent bases on which the decision by this court in the *Pink* case rested was the conclusion that

the claims of creditors there involved were not entitled to protection against the effect of extraterritorial enforcement of the nationalization decrees.

Among the claims filed with the Receivers here are claims of American nationals, i.e., Friede, Tillman and Manufacturers Trust Company, and the claim of Millard as assignee of the Chinese Government.

In *United States* v. *Belmont*, 301 U. S. 324 (1937), this Court pointed out that "So far as the record shows, only the rights of the Russian Corporation have been affected by what has been done", and that nationals of another country which has taken over their property must look to their own government for redress (p. 332). It was careful to state that "We do not consider the status of adverse claims, if there be any, of others not parties to this action. And nothing we have said is to be construed as foreclosing the assertion of any such claim to the fund involved, by intervention or other appropriate proceeding" (p. 333).

In the *Pink* case, this Court said (p. 226):

> "The holding in the *Belmont* case is therefore determinative of the present controversy, unless the stake of the foreign creditors in this liquidation proceeding and the provision which New York has provided for their protection call for a different result."

Mr. Justice Frankfurter in his concurring opinion likewise adverted to the special situation that was presented "when all claims of local creditors were satisfied and only the conflicting claims of Russia and of former Russian creditors were involved" (p. 236). The Court determined that such claims did not "call for a different result" from that reached in the *Belmont* case. See "Effect of Soviet Recognition

upon Russian Confiscatory Decrees", 51 *Yale Law Journal,* 848, 854 (1942):

> "* * * The *Pink* case should be limited to its facts, and should foreclose only Russian owners and Russian creditors from recovering assets within the United States to which the United States itself lays claim as assignee of the confiscating Russian Government."

This Court has thus far consistently reserved the question of claims of American nationals. Thus in *United States* v. *Belmont,* the Court said (301 U. S. at p. 332) that it would be time enough to consider the rights of our nationals when it shall be made to appear that they are so affected as to entitle them to judicial relief. Similarly in the *Pink* case, the Court was careful to state its assumption that none of the creditors whose claims were there asserted were citizens of the United States (p. 227). The concurring opinion of Mr. Justice Frankfurter emphasizes the same point (p. 237).

One of the main purposes of the Litvinov Assignment being the protection of American claims (*United States* v. *Pink,* 315 U. S. at p. 228) it would be strange indeed were the Assignment so to be construed as to deprive American nationals, pursuing their remedies in the courts, of their right to enforce the very claims sought to be protected. The emphasis given to the absence of American claims in the *Pink* case clearly implies a *caveat* that the rights of American nationals to enforce their claims were to be left intact.

The Government has expressed the same view of the scope of public policy applicable to the Litvinov Assignment. In its brief in this Court in *United States* v. *Moscow*

Fire Ins. Co., 309 U. S. 624 (1939), the Government said (at p. 89):

> "Even if the state policy formulated by the court below could operate in the absence of an expression of a dominant national policy, the Litvinov Assignment determines that policy to be that *after the payment of American nationals* the surplus fund shall be collected and liquidated in favor of the claims of the United States and of our nationals against the Soviet Government and its nationals." [Italics added.]

The Assignment has been similarly construed by the New York Court of Appeals. In *United States* v. *Manhattan Company*, 276 N. Y. 396 (1938), a case involving the rights of the United States in property of the Northern Insurance Company of Moscow, the Court of Appeals followed the *Belmont* case, and construed the decision as holding

> "* * * that recognition must be given to the validity of the confiscation decree * * * in so far only as the act of confiscation did not interfere with the rights and equities of our nationals in such property and of adverse claimants thereto to the extent that our courts may be opened to them for the assertion of their claims" (pp. 405, 406).

Any policy which would deny protection to the claims of American creditors would not only nullify the *raison d'etre* of the Litvinov Assignment, but would be violative of the Constitutional mandate that property may not be taken without compensation.

The right of enforcing a legal claim is property. *Pritchard* v. *Norton*, 106 U. S. 124, 132 (1882); *Sliosberg* v. *New York Life Ins. Co.*, 217 App. Div. 67 (1st Dep't

1926), aff'd 244 N. Y. 482 (1927). In the latter case the court said (217 App. Div. at p. 74):

> "When an action is instituted in the State Court the right of action becomes property within the State, and is then subject to the constitutional protection against its deprivation by any State law."

No treaty, far less an executive agreement, can violate the Constitution by taking such property from an American citizen without compensation. See *The Cherokee Tobacco,* 78 U. S. 616, 620, 621 (1870); *In re Beale,* 2 F. Supp. 899 (D. C. Minn., 1933), aff'd 71 F. (2d) 737 (C. C. A. 8th, 1934); *Geofroy* v. *Riggs,* 133 U. S. 258, 267 (1890).

The Executive having no authority in peace or war to confiscate property (*Brown* v. *United States,* 8 Cranch, 110, 128 [1814]), it would certainly follow that the Executive has no power to override the Constitution by indirection.

The claim of Millard, as assignee of the Chinese Government, is similarly entitled to protection. That claim is for moneys paid by the Chinese Government to Russo-Asiatic at Shanghai during the period from 1917 to 1926, for transmission to its London branch pursuant to the Chinese Reorganization Loan Agreement of 1913. The Millard claim, in the amount of £641,794.13.3, is based upon the difference between the amounts transmitted by the Shanghai branch of Russo-Asiatic to its London branch from 1917 to 1926 and the amounts disbursed by the London branch in payment of interest coupons and bond retirements in accordance with the Agreement (R. 557-60). It will be noted that the claim does not arise out of a Russian transaction made in contemplation of Russian law, but arises out of the perform-

ance by China of its obligations under the Reorganization Loan Agreement with branches of Russo-Asiatic *after* the decrees nationalizing banks in Russia (and partly after the Soviet-Chinese treaty of May 31, 1924 [Ex. 11; R. 3218]) and consequently it may not be said to be governed by Russian law.

It is submitted that the existence in this case of claims of American nationals and of other non-Russian creditors does "call for a different result" from that reached in the *Belmont* and *Pink* cases, and requires a determination that the Receivers, appointed to marshall the assets of Russo-Asiatic and to pass upon such claims by the court in which they are pending, are entitled to possession of the funds in suit.

POINT II

RIGHTS ACQUIRED BY ATTACHMENT PRIOR TO THE LITVINOV ASSIGNMENT BY AMERICAN AND OTHER NON-RUSSIAN CREDITORS OF RUSSO-ASIATIC, ARE SUPERIOR TO THE RIGHTS OF THE UNITED STATES UNDER THE LITVINOV ASSIGNMENT.

Although the Court in the *Pink* case characterized its holding in the *Belmont* case as a holding that recognition of a foreign sovereign 'is retroactive and validates all actions and conduct of the government so recognized from the commencement of its existence" (p. 223), that statement is manifestly subject to qualification in respect of intervening events. In the interregnum between the establishment of a foreign government in power and its recognition by this country, courts "are bound to consider the ancient state of things as remaining unaltered", *Kennett* v. *Chambers,* 14 How. 38, 51 (1852); *Rose* v. *Himely,* 4 Cranch 241 (1808);

Gelston v. *Hoyt,* 3 Wheat. 246 (1818); and what has been done in our courts is done with final effect. *Agency of Canadian Car Co.* v. *American Can Co.,* 258 Fed. 363, 369 (C. C. A. 2d, 1919); *Lehigh Valley RR.* v. *State of Russia,* 21 F. (2d) 396, 400, 401 (C. C. A. 2d, 1927); *Guaranty Trust Co.* v. *United States,* 304 U. S. 126, 141 (1938); *State of Russia* v. *National City Bank,* 69 F. (2d) 44, 48 (C. C. A. 2d, 1934).

In the *Pink* case, all domestic and some foreign creditors had been paid but there was no suggestion that such payments might be recovered by the United States. Similarly, in *Guaranty Trust Co.* v. *United States,* this Court pointed out that recognition of the Soviet Government, although "an action which for many purposes validated here that government's previous acts within its own territory", nevertheless "left unaffected those legal consequences of the previous recognition of the Provisional Government and its representatives, which attached to action taken here prior to the later recognition"; and that the question remained whether any given right asserted by the United States under the Litvinov Assignment had been acquired "free of a preexisting infirmity" arising prior to recognition (304 U. S. at pp. 140, 141, 142).

During the period of non-recognition, a variety of rights in respect of property of Russo-Asiatic were asserted and acted upon. Judgments were entered in a number of cases to which Russo-Asiatic was a party. Among such cases are *Wulfsohn* v. *Russo-Asiatic Bank,* 11 F. (2d) 715 (C. C. A. 9th, 1926); *Hoppe* v. *Russo-Asiatic Bank,* 200 App. Div. 460 (1st Dept. 1922), aff'd 235 N. Y. 37 (1923); *Western Investors Corp.* v. *Russo-Asiatic Bank,* 204 App. Div. 411 (1st Dept. 1923). Guaranty itself paid

out, in regular course of business, almost $1,000,000 of funds standing to the credit of Russo-Asiatic for its branches at Shanghai, Paris and Yokohama (R. 233; cf. Ex. 5, R. 3193). The theory of retroactivity would, if literally applied to transactions effected outside of Soviet Russia, require the nullification of all such action—a result which we believe demonstrates its inapplicability.

Among the rights to property of Russo-Asiatic which came into existence during the period of non-recognition and prior to the Litvinov Assignment were the attachment liens acquired by Friede, Millard and Tillman, creditors of Russo-Asiatic whose claims have been filed with the Receivers (R. 553, 566).

Ordinarily, the laws of a foreign country, whether the government of such country has been recognized or not, are subject to local laws of the situs of the property for the protection of creditors. The mere recognition and enforcement of the validity of a foreign transfer does not, even under the full faith and credit clause of the Federal Constitution, preclude the attachment of property within the state by a local creditor of a foreign corporation, all of whose property has been previously transferred in the state of its incorporation to a statutory successor. *Clark* v. *Williard*, 294 U. S. 211 (1935); *Fischer* v. *American United Life Insurance Co.*, 314 U. S. 549, 553 (1942).

As this Court said in *Clark* v. *Williard* (pp. 213, 214):

> "If the corporation were still in being, and still the owner of the assets, its ownership would be subordinate to the process of the local courts. So much would be conceded everywhere.
>
> * * * * * * *
>
> "The principal of these decisions applies with undiminished force to a statutory successor. In re-

> spect to his subjection to the power of the local law, his position is no better than that of the dissolved corporation to whose title he has succeeded * * *."

It is submitted that subsequent recognition of Soviet Russia by the United States and the Litvinov Assignment could not have the effect of invalidating attachment liens acquired prior thereto (*Guaranty Trust Co.* v. *U. S.*, 304 U. S. 126, 141 (1938); *Prevost* v. *Greneaux*, 19 How. 1, 7; *State of Russia* v. *National City Bank*, 69 F. (2d) 45, 48 (C. C. A. 2d, 1934); *Lehigh Valley R. Co.* v. *State of Russia*, 21 F. (2d) 396, 400, 401 (C. C. A. 2d, 1927); and that, whether or not property which had been attached was expressly excluded from the Litvinov Assignment by its second paragraph (See Anderson "Recognition of Russia", 28 *American Journal International Law*, January 1934, 90, 96), they are clearly "preexisting infirmities" in the rights acquired by the Government under the Assignment.

POINT III

THE PETITIONERS, AS RECEIVERS UNDER SECTION 977-b OF THE NEW YORK CIVIL PRACTICE ACT, ARE ENTITLED TO ASSERT THE RIGHTS OF CREDITORS WHOSE CLAIMS HAVE BEEN FILED IN THE RECEIVERSHIP.

The opinion of the District Court (which, in so far as material here, was adopted by the Circuit Court of Appeals) does not deal with the question of the nationality of the claims for which the petitioners seek protection. The reason for such omission is apparently to be found in the statement (58 F. Supp. at p. 629) that:

> "whatever might be the rights of a New York creditor, if asserted, the receiver is a mere custodian asking possession * * *."

The District Court evidently concluded that the Receivers were not entitled to assert the rights of creditors whose claims were filed in the receivership and it was apparently for that reason that the court did not discuss the effect of the Millard and Friede attachments.

In reaching that conclusion, the court below overlooked the fact that under New York law—which is clearly controlling (*Ruhlin* v. *New York Life*, 304 U. S. 202 [1938]; *Guaranty Trust Co.* v. *York*, 326 U. S. 99, 109 [1945])—the Receivers clearly do have the right to assert all of the rights of creditors whose claims have been filed with them. Thus in *United States* v. *Pink*, 36 N. Y. Supp. (2d) 961 (Sup. Ct. 1942), in answer to the contention that the judgment of this Court in the *Pink* case was not binding on individual claimants, because they were not actual parties to the action, the New York court points out that the Superintendent of Insurance, as liquidator, was in effect a Statutory Receiver, and said (pp. 965-66):

> "* * * As liquidator, he represented the individual defendants and other claimants, and any judgment that would bind and estop him would also bind and estop them, even though they were not named in the action, or were not parties to it by name. Herring v. New York, L. E. & W. R. Co., 105 N. Y. 340, 370, 371, 12 N. E. 763; Ashton v. City of Rochester, 133 N. Y. 187, 193, 194, 30 N. E. 965, 31 N. E. 334, 28 Am. St. Rep. 619; Brenner v. Title Guarantee & Trust Co., 276 N. Y. 230-237, 238, 11 N. E. 2d 890, 114 A. L. R. 1010; Freeman on Judgments, 5th Ed., 435-437; Black on

> Judgments, 2d Ed. § 585a, 30 Am. Jur. 962, § 228; 34 C. J. 1004, § 1424. 'This is upon the principle that they are represented in the litigation by agencies authorized to speak for them, and to protect their interests.' Ashton v. City of Rochester, supra [133 N. Y. 187, 30 N. E. 967]."

A conclusion that the Receivers are not entitled to assert the right of creditors in the Receivership would work manifest injustice. Both the 1936 order appointing the temporary Receivers (Ex. 6, R. 3196) and the 1938 judgment appointing the permanent Receivers (Ex. 9, R. 3205), contained injunctions which prohibited creditors from prosecuting their claims individually against the property of Russo-Asiatic. Such injunctive provisions were within the jurisdiction of the court which appointed the Receivers and effectively bound all creditors of Russo-Asiatic. *Matter of Attorney General* v. *Mutual Life Insurance Company,* 77 N. Y. 272, 276-77 (1879); *Re Receiver of City Bank of Buffalo,* 10 Paige 378 (1843).

Even apart from such injunctive provisions, the mere filing of claims in the receivership disenables a creditor from asserting his claim independently of the receivership. *Re Receiver of City Bank of Buffalo,* 10 Paige 378 (1843), 382; *Farmers Loan and Trust Company* v. *Bankers and Merchants Telegraph Co. et al.,* 83 Hun 560 (1895), aff'd 148 N. Y. 315 (1898); *Alexander* v. *Hillman,* 296 U. S. 222 (1935).

Accordingly, the Receivers must be held to be entitled to assert the rights of creditors whose claims had been filed in the receivership in order that such rights can be preserved.

POINT IV

THE RUSSIAN DECREES NATIONALIZING BANKS DID NOT HAVE EXTRATERRITORIAL EFFECT UPON THE BANK DEPOSITS OF RUSSO-ASIATIC IN NEW YORK.

In the *Pink* case, this Court concluded, with reference to the Soviet decree nationalizing insurance companies that "so far as its intended effect is concerned, the Russian decree embraced the New York assets of the First Russian Insurance Company" (p. 221). In so concluding, this Court overruled the holding of the New York Court of Appeals in *Moscow Fire Ins. Co.* v. *Bank of New York & Trust Co.*, 280 N. Y. 286 (1939), which had been made on the basis of the evidence before that Court concerning the interpretation of Soviet law, that the insurance decrees were not intended to have extraterritorial effect. This Court, however, made it clear that if the Russian decrees in question had no extraterritorial effect, that would be "decisive of the present controversy. For the United States acquired, under the Litvinov Assignment, only such rights as Russia had." (p. 217.)

This Court based its conclusion in the *Pink* case on an opinion of the Third Department of the Soviet Commissariat of Justice, conceived after the decision of the *Moscow* case, that "all nationalized funds and property of former private enterprises and companies, in particular, by virtue of the decree of Novemder 28, 1918 [the insurance decree] * * * the funds and property of the former insurance companies, constitute the property of the State, irrespective of the nature of the property and irrespective of whether it was situated within the territorial limits of the R. S. F. S. R. or abroad" (Interpretation of November 28, 1937, Ex. 319,

R. 3427). The evidence in the present case, however,—which was not before this Court in the *Pink* case—establishes that the Third Department of the Commissariat of Justice is, like our own Department of Justice, authorized merely to render advisory opinions to governmental agencies upon request (R. 2283, Exs. 320, 408; R. 3428, 3478), and that the only body having authority to render conclusive interpretations of Soviet law is the Plenum of the Supreme Court (R. 2283, 2572; Ex. 2R, R. 3182).

Manifestly, the "interpretation" of the Soviet Commissariat of Justice, rendered for the purpose of affecting the result of a litigation in a foreign jurisdiction, means no more than that it was in the interest of the Soviet Government at the time to adopt such interpretation. An analogous situation would be presented here if the United States were to produce an impressively sealed opinion of the Attorney General certifying that under the law of the United States the funds here involved belong to the United States Government. As the English High Court of Justice said in *The Jupiter* (No. 3) [1927], P. 122 (pp. 138-139):

> "* * * In a question between the Crown and a private person as to the property in chattels here, it surely would not be conclusive if a Minister of State made oath that the property was in the Crown. A fortiori, is the declaration of a sovereign to be accepted as conclusive when a question as to property is litigated between private persons, and the evidence produced by one of them is a declaration by a sovereign that the property had been in that sovereign? Moreover, if the declarations of a sovereign as to the ownership of property, not made for the purpose of securing immunity from jurisdiction, are to be conclusive, there is no reason why the same force should not be given to all other declarations. Why call

> foreign lawyers to prove the fact or the effect of foreign law, if a simple declaration by the representative of the foreign sovereign would be conclusive? * * *"

There is, however, no Soviet Commissariat of Justice "interpretation" of the decrees nationalizing banks, as distinguished from the decrees nationalizing insurance and other companies. The reason for such omission is plain; for, unique among all the Soviet nationalization decrees, the banking decrees took over not only assets, but also liabilities. The Decree of December 27, 1917, in relevant part is as follows (Ex. 2A, R. 2681-82):

> "1. Banking business is declared a State Monopoly.
>
> "2. All existing private joint stock banks and banking houses are merged with the State Bank.
>
> "3. The assets and liabilities of the liquidated banks are taken over by the State Bank.
>
> "4. The method of effecting the merger of private banks with the State Bank shall be determined by a special decree."

In the case of Russian banking corporations, such as Russo-Asiatic, carrying on a world-wide business, with branches in France, England and the Far East, it is readily apparent that the Soviet Government, whatever may have been its desire to acquire *assets* wherever it could find them, would not voluntarily have assumed far-flung financial commitments of Russian banks in foreign countries. Every act of the Soviet Government with reference to the banking decrees is consistent with, and consistent only with, a fixed purpose to restrict the application of such decrees to territory subject to its control.

It is true that the decree of December 27, 1917, does not contain any express territorial limitation. In that respect, however, it is precisely analogous to the decree of December 2, 1918 "liquidating" *foreign* banks functioning within the R. S. F. S. R. (Ex. 21, R. 3154). Certainly, no one would suggest that the Soviet Government intended thereby to affect assets of foreign banks outside Soviet Russia.

Furthermore, the failure of the Banking Decree of December 27, 1917 affirmatively to specify properties located abroad is significant, in view of the fact that in other cases, where the Soviet Government intended to reach foreign property, appropriate language was used. Thus, in the decree of December 28, 1917, nationalizing the Russian-Belgian Metallurgical Company (Ex. 2M, R. 3173) and in the decree of July 13, 1918, nationalizing the property of the Romanoff family (Ex. 2N, R. 3175), foreign properties (and in the latter case, foreign bank deposits) were specifically included.

In addition, subsequent nationalization decrees and the course of conduct followed by the Soviet Government make it abundantly clear that only the Russian assets and liabilities were intended to be affected by the decrees.

The decree of December 27 provided that "the method of effecting the merger of private banks with the State Bank shall be determined by a special decree" (par. 4). Pursuant to that provision, the regulations of December 10, 1918 (Ex. 2J, R. 3155), June 14, 1919 (Ex. 2S, R. 2691), and August 3, 1921 (Ex. 2L, R. 3168) were promulgated. Those regulations cover, in elaborate detail, all aspects of the nationalization of Russian private banks and include provisions for the establishment of technical liqui-

dation boards, the restatement of accounts, and amalgamation of balance sheets (as of December 27, 1917), the continuance of operations as branches of the People's Bank and the computation and credit of interest. Notwithstanding the detail of such regulations, no provision whatever is made for taking over or liquidating foreign branches or for obtaining foreign properties.

Furthermore, the decree of August 3, 1921 states that the transfer of assets and liabilities under the decree of December 27, 1917, had "already been everywhere completed" and, on that basis, directed the immediate discontinuance of "any and all proceedings of nationalization" (Ex. 2L, R. 3169).

No further action was taken in respect of the nationalization of banks, and at no time was any action even suggested, much less taken, with respect to the foreign properties of nationalized banks (R. 2193).

That the failure of the Soviet Government to take such action was not due to inadvertence or to difficulties incident to its foreign relations is made clear by the provision in the decree of January 31, 1918 (Ex. 2B, R. 3151), temporarily stopping payment of bank deposits to foreign embassies and missions "in order to make it possible for the Russian Republic to have at its disposal the people's money deposited abroad in foreign banks by the former government"—only by "the former government", be it noted, not by the nationalized corporations—an unequivocal indication that the Soviet Government was fully conscious of the existence of bank deposits abroad and was taking action with respect to such of those bank deposits as it had intended to acquire.

In this connection it is significant that although the Commissariat of Finance on August 2, 1921, ordered the

establishment of a subdivision of said Commissariat for the ascertaining of mutual indebtedness between credit establishments of the Soviet republic and credit establishments abroad, there is no evidence that any attempt was made by such subdivision to ascertain or collect the balances of the former private banks in credit institutions abroad (Ex. 406, R. 3474).

The fact that the Soviet government considered it necessary to enact new bank nationalization decrees in territory of the former Russian Empire when such territory came under its domination (R. 2196, 2615, 2616) is persuasive evidence that the decrees were not intended to have any force outside of territory actually controlled by the Soviets.

It is significant that although the Soviets brought actions in various parts of the world to recover their nationalized ships (*The Penza*, 277 Fed. 91 (E. D. N. Y. 1921); *The Rogdai*, 278 Fed. 294 (N. D. Calif. 1920); *The Jupiter* (No. 3) [1927] P. 122; aff'd Ct. of Appeal [1927] P. 250), there is no known instance of an action being brought to recover any deposits abroad of nationalized banks.

Indeed, in the case of Russo-Asiatic, the Soviet Government, through its participation in the management of the Chinese Eastern Railway, maintained a continuing banking relationship with certain of the Far Eastern branches of the Bank after its Russian properties had been nationalized. On May 31, 1924, upon recognition of the Soviet Government by China, the Soviet Government entered into an agreement with the Chinese Government under which the former took part in the operation of the Chinese Eastern Railway (R. 575-6; Ex. 11, R. 3218, 3224-6). From that date until the liquidation of the Chinese branches of Russo-Asiatic on October 1, 1926, not only did the

Manchurian branches of the Bank at Harbin, Hailar and Chang Chun continue to operate within the zone of the Chinese Eastern Railway (R. 576), but the latter's account with Russo-Asiatic was continued by the Soviet Government (R. 577; Ex. 12, R. 3227). Notwithstanding this close post-nationalization identification of the Soviet Government with a banking enterprise, all of whose assets abroad are now said to have been taken over by that Government in 1917, no claim to the Chinese properties of the Bank was ever asserted by the Soviet Government either before or after the liquidation of the Chinese branches (R. 577-8).

Finally, the only evidence in this case of an interpretation of the effect of the Soviet decrees by the Supreme Court of Russia (the only conclusive authority upon the meaning of Soviet law [R. 2283, 2572; Ex. 2R, R. 3182]) is to the effect that those decrees did not affect property rights in territory which was not under Soviet control. That was the decision in *Johannson* v. *Kunst & Albers* in which it was held that the 1918 decree of the R. S. F. S. R. abolishing the right of inheritance could not be made the basis for determining legal relationships in Vladivostok because the decree had not specifically "been introduced on the territory for the former Far Eastern Republic through either any enactment of the R. C. [Revolutionary Committee] of the Far East or any decree of the Central Government of the R. S. F. S. R." after Vladivostok became a part of the R. S. F. S. R. (Ex. 427, R. 3243, 45). It should be here noted that this decision necessarily required an interpretation of the banking decrees since the case involved a bank deposit and that although the Soviet Government was a party to the action and the case involved the liability of a

private banking house no claim was made that the Soviet Government had succeeded to the assets and liabilities of the bank by reason of the banking decree of 1917.

In *In re Russian Bank for Foreign Trade* [1933], 1 Ch. 745, the English High Court of Justice carefully reviewed the Soviet decrees nationalizing banks, and reached the following conclusions:

> (1) "By the decree of December, 1917, [Ex. 2A, R. 2681] the assets and liabilities of the bank *within Soviet territory* were taken over by the People's Bank, and this in my opinion involves the destruction of the original debt and a kind of statutory novation (in some sense, perhaps, only a theoretical one) whereby the State Bank became liable to discharge it" (p. 766). [Italics added.]
>
> (2) "In passing I note that the decree [the decree of January 19, 1920 (Ex. 2K, R. 2689) abolishing the People's Bank] assumes that all the assets and liabilities of the former joint-stock banks capable of being vested had already been vested in the People's Bank" (p. 760).
>
> (3) "It is interesting to note that the same view [i.e., the view that the decrees in question could not have the effect of extinguishing debts situated in England] is taken by the R. S. F. S. R. itself in a circular dated April 12, 1922 [Ex. 2P, R. 3177] and in a circular issued by the People's Commissariat of Justice to all Districts Courts dated September 26, 1923 [Ex. 2Q, R. 3179] which are set out in the elaborate judgment of Hill, J., above referred to [i.e., *The Jupiter*]. These circulars show that the Soviet Government does not regard the nationalising decrees as having any extra-territorial effect even as against Russian citizens" (p. 767).

(4) "Of course, if I am right in thinking that the nationalization decrees have no extra-territorial operation the R. S. F. S. R. have no claim to any of the property which is involved, and as I have pointed out, this seems to be their own view" (p. 770).

It is submitted that the conclusion must be that, although the insurance decrees may have "nationalized the business of insurance and all of the property, wherever situated" (315 U. S. 210), the decrees nationalizing banks were not intended to affect property outside the territory of Soviet Russia.

POINT V

THE LITVINOV ASSIGNMENT DOES NOT REQUIRE NULLIFICATION OF THE PROCEDURAL AND REMEDIAL PROVISIONS OF SECTION 977-b OF THE NEW YORK CIVIL PRACTICE ACT.

The local law superseded by this Court in the *Pink* case was a State public policy against confiscation which denied validity, in New York, to a foreign law confiscating assets and repudiating liabilities. This Court however called attention (p. 222) to its earlier holding in the *Guaranty Trust Company* case (304 U. S. 126 [1938]) that the Litvinov Assignment did not require the abrogation of other local laws, such as the statute of limitations, notwithstanding that their effect would be to limit or prevent the enforcement of rights acquired by virtue of the Russian decrees. In the *Guaranty Trust Company* case, this Court had pointed out (304 U. S. at p. 134):

"By voluntarily appearing in the role of suitor it [the foreign sovereign] abandons its immunity from

> suit and subjects itself to the procedure and rules of decision governing the forum which it has sought. Even the domestic sovereign by joining in suit accepts whatever liabilities the court may decide to be a reasonable incident of that act. *United States* v. *The Thekla,* 266 U. S. 328, 340, 341; *United States* v. *Stinson,* 197 U. S. 200, 205; *The Davis,* 10 Wall. 15; *The Siren,* 7 Wall. 152, 159."

In other words, in determining the Federal policy evidenced by the Litvinov Assignment, this Court has held that a local policy denying validity to the Russian nationalization decrees is contrary to Federal policy and therefore unenforcible; but that local laws of general application regulating the procedure for the enforcement of rights do not conflict with Federal policy and may be given their customary effect.

That is also the Government's view. Thus in its brief in the Supreme Court in *United States* v. *Moscow,* 309 U. S. 624 (1939), the United States said (p. 40):

> "This holding [*Guaranty Trust* v. *United States*] merely recognizes that when judicial aid is invoked in the consummation of the assignment, *the procedural and remedial provisions, which define the nature of judicial remedies available in the forum, apply.*" (Italics added.)

In the instant case, the local law involved is not a local policy against confiscation, but is that part of Section 977-b of the Civil Practice Act which, through receivership, creates an agency to collect and administer the fund for the benefit of creditors and other claimants. It is what

the Government has described as "the procedural and remedial provisions which define the nature of judicial remedies available in the forum". It provides a comprehensive plan for the collection or marshalling by court-appointed receivers of assets in New York, belonging to any foreign corporation previously dissolved for any cause in its domicile; for the giving of notices to all creditors and others interested as directed by the Court; for the determination of claims of all creditors by the receivers, subject to review by the Court; and for the distribution pursuant to Court order of the assets collected.

It will, of course, be the duty of the Receivers to distribute the assets under court order in conformity with the applicable principles of law and national policy. *Propper* v. *Buck*, 178 Misc. 76 (Sup. Ct., 1942).

As was said in *Fosdick* v. *Schall*, 99 U. S. 235, 251 (1878):

> "The possession taken by the receiver is only that of the court, whose officer he is * * *. He holds, pending the litigation, for the benefit of whomsoever in the end it shall be found to concern, and in the mean time the court proceeds to determine the rights of the parties upon the same principle it would if no change of possession had taken place."

Receivership procedure established by local law for the protection of all claimants to the assets in question is in no sense inconsistent with the enforcement of the claim of the United States. That fact was recognized by the Government in the present case when it said, in connection with its appeal from the order of the District Court denying its motions to consolidate its actions with the Re-

ceivers' action and for substitution in the latter action (Brief in the Circuit Court of Appeals, p. 121):

> "Those provisions of the statute [Section 977-b] which conflict with the Government's interest * * * are now held ineffective by the *Pink* case. But the proceeding is *in rem* for the administration of the local assets of the dissolved foreign corporation, and for the benefit of all persons who may claim an interest in such *res*. Its scope is indicated in Governor Lehman's memorandum filed upon his approval of the Bill and also in a statement thereon by the State Court."*

The fact that, as the court below said, Section 977-b "proposes a complete scheme of distribution, taking in creditors wherever they may reside" (R. 3078) does not bring New York's policy in collision with that of the federal government. The power of a State to deal with assets in its jurisdiction has always been upheld unless exercised in a manner to conflict with paramount federal law. In *Clark* v. *Williard*, 294 U. S. 211, this Court said (p. 213):

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*The memorandum of Governor Lehman upon approval of Section 977-b stated in part:

> "The purpose of this Bill is to provide some machinery for the liquidation of assets in the State of New York which belong to certain foreign corporations. * * *
>
> * * * * *
>
> "It seems to me that some machinery must be provided for the determination of these conflicting rights to such assets. The courts are the proper agency for the performance of the determination. In effect this Bill will vest jurisdiction in our courts to enable them to try and determine the rights asserted both by governments and by private corporations and individuals." [Memorandum of June 8, 1936, filed with Senate Bill Int. No. 922, Pr. No. 1623.]

> "Every state has jurisdiction to determine for itself the liability of property within its territorial limits to seizure and sale under the process of its courts. *Green* v. *Van Buskirk,* 5 Wall. 307, 312; 7 Wall. 139; *Hervey* v. *Rhode Island Locomotive Works,* 93 U. S. 664, 671; *Security Trust Co.* v. *Dodd, Mead & Co.,* 173 U. S. 624, 628. Montana does not challenge the standing of this foreign liquidator as successor to the dissolved corporation or as owner of its assets. On the contrary his standing and ownership are now explicitly conceded. All that Montana does by the decree under review is to impose upon such ownership the lien of judgments and executions in conformity with local law. In this there is no denial to the statutes of Iowa or to its judicial proceedings of the faith and credit owing to them under the Constitution of the United States. United States Constitution, Article IV, § 1."

The fact that the United States is a claimant to the funds here sued for does not require any different conclusion. *United States* v. *Bank of New York,* 296 U. S. 463 (1936); *Meyer* v. *Petrograd Metal Works,* 256 App. Div. 1077 (2d Dep't, 1939); leave to appeal den. 281 N. Y. 887 (1939). As the Court said in the *Meyer* case (p. 1078):

> "* * * The proceeding, instituted in accordance with the provisions of section 977-b of the Civil Practice Act, is *in rem* for the purpose of distribution of assets of a foreign corporation which has been nationalized and may not be vitiated because of the status of the United States as a claimant to the assets. It may, without impairment of its rights, prosecute its claim before the receiver."

CONCLUSION

It is respectfully submitted that this case calls for the exercise of supervisory powers by this Court and that the writ should be allowed.

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August 1, 1947.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

Nos. 245 and 247

IRWIN STEINGUT and HAROLD E. BLODGETT, as Receivers of the assets in New York of Russo-Asiatic Bank,

and

JAMES A. TILLMAN,

Petitioners,

—against—

GUARANTY TRUST COMPANY OF NEW YORK and others.

BRIEF OF GUARANTY TRUST COMPANY OF NEW YORK IN OPPOSITION TO PETITIONS FOR CERTIORARI

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GUARANTY TRUST COMPANY OF NEW YORK and others.

BRIEF OF GUARANTY TRUST COMPANY OF NEW YORK IN OPPOSITION TO PETITIONS FOR CERTIORARI

This brief is filed in opposition to the separate petitions of James A. Tillman (an intervenor in the above-entitled action) dated August 5 1947, and Messrs. Steingut and Blodgett as receivers of the assets in New York of Russo-Asiatic Bank (substituted plaintiffs in the above-entitled action) dated August 1 1947. The subject-matter of the above-entitled action is the same as the subject-matter of the separate actions brought by the United States against Guaranty Trust Company of New York, in which the undersigned have separately prayed for certiorari by petition dated July 31 1947, Nos. 239 and 240.

Opinions Below

The opinions of the District Court are reported in 58 F. Supp. 623 and 60 F. Supp. 103 (R. 3060, 3106; also R. 3110, not reported). The opinion of the Second Circuit Court of Appeals is reported in 161 F. (2d) 571 (R. 3562).

Jurisdiction

The judgment of the Circuit Court of Appeals for the Second Circuit (R. 3568) was filed May 7 1947. The jurisdiction of this Court invoked by the petitioners rests on Judicial Code §240(a) as amended by the Act of February 13 1925, 28 U. S. C. §347(a), 43 Stat. 938.

Statutes Involved

The Litvinov assignment of November 16 1933, is set forth in this Court's opinion in *United States* v. *Pink,* 315 U. S. 203 at 212.

New York Civil Practice Act §977-b, approved June 10 1936, provides in part:

> "1. An action may be instituted in the supreme court for the appointment of a receiver of the assets in this state of a foreign corporation, whenever such foreign corporation has assets or property of any kind whatsoever, tangible or intangible, within the state of New York, and (a) it has heretofore been or is hereafter dissolved, liquidated or nationalized or (b) its charter or organic law has heretofore been or hereafter is suspended, repealed, revoked or annulled, or (c) it has heretofore ceased or hereafter ceases to do

business whether voluntarily or otherwise or by reason of the expiration of the term of its existence or by revocation or annulment of its organic law or by dissolution or otherwise. . . .

"5. An order directing service by publication of the summons shall be made upon application of a plaintiff in any action brought pursuant to this section and must be founded upon a verified complaint, containing the allegations set forth in subdivision four hereof, and upon an affidavit reciting that personal service of the summons cannot be effected within the state with due diligence and that a temporary receiver of its property within the state of New York has been appointed pursuant to this section in such action and that a copy of the order appointing the receiver has been served personally by or on behalf of such receiver upon a person, firm or corporation holding property, tangible or intangible, of the said foreign corporation, or against whom a claim or demand in favor of such foreign corporation exists and that demand therefor has been made upon such person, firm or corporation by or on behalf of such receiver. . . .

"19. Title to all assets, credits, choses in action and property, tangible and intangible, of any and every kind whatsoever, which such corporation owns, is entitled to or may be entitled to claim or receive within the state of New York shall immediately vest in the receiver upon the making of the order appointing him. . . .

"20. Any receiver appointed pursuant to this section shall be deemed to have obtained possession of all assets, credits, choses in action and property, tangible

and intangible, of the said foreign corporation, by causing to be delivered to and left with the person, firm or corporation holding the same or against whom the claim or demand exists, a copy of the order appointing said receiver together with a demand therefor."

Statement of the Case

Guaranty Trust Company of New York is a New York banking corporation which on December 27 1917, the date of nationalization of the Russian banks by the Soviet Government, held deposit accounts aggregating $1,483,481.36 in the name of Russo-Asiatic Bank, a banking corporation organized under the law of the Russian Imperial Government in 1910.

The above-entitled action, to which petitioners are parties, was brought in equity for an accounting in the Southern District of New York on May 12 1919, by attorneys acting under the authority of the General Manager for the Far East of Russo-Asiatic Bank (R. 17) and also of the Bank's board of directors constituted in Paris after the nationalization of the Bank in Russia (R. 227). Messrs. Steingut and Blodgett, as receivers, were substituted plaintiffs in the action on July 29 1939, having first been appointed June 10 1936 (R. 230). Russo-Asiatic Bank at no time had a branch in the United States and never did business in the United States (R. 224).

Petitioner Tillman intervened in the action by order made in 1936, i.e. while the plaintiff was still Russo-Asiatic Bank (R. 251). He obtained and levied on the Russo-Asiatic accounts with Guaranty Trust Company an attachment in 1927 (R. 249).

Judgment in this action was entered in favor of Guaranty Trust Company against all the petitioners (R. 288). The Second Circuit Court of Appeals affirmed.

In 1933 by the Litvinov assignment the United States claims to have acquired title to the Russo-Asiatic Bank accounts with Guaranty Trust Company. This claim of title, in other words, antedates the appointment of the receivers, their substitution in the action, and the intervention therein of Tillman. Two separate suits at law were brought by the United States to enforce its claim of title; these are described in our petition for certiorari in those actions, Nos. 239 and 240. Attempts by the United States to be substituted for the receivers as plaintiff in the above-entitled action, or in the alternative for a complete and full consolidation of the three actions, failed (R. 216, 254). Instead, the three actions were consolidated for purposes of trial only, and were tried before the same judge, who made common findings and conclusions while granting separate judgments. The judgments in favor of United States against Guaranty Trust Company for a total of $3,202,028.45 are the subject of our petition for certiorari, Nos. 239-240; while the separate judgment in favor of Guaranty Trust Company against the receivers and Tillman (R. 288) are the subject of the separate petitions of the receivers and of Tillman which we here oppose.

POINT I

The Petition of James A. Tillman in No. 247 presents no question worthy of review here and should be denied.

The opinion of the District Court (58 F. Supp. at 642-3, R. 3101-4) which the Court of Appeals in effect adopted, contains a lucid statement of the reasons which deprive Tillman's claim of any foundation whatever. The findings are also specific on the point (R. 249-52). In substance, the record shows without dispute that at the time the United States acquired its claim of title through the Litvinov assignment, viz. November 16 1933, the petitioner Tillman did not have an attachment at all. At that time his warrant of attachment stood vacated by order entered in 1928 on consent in the District Court for the Eastern District of New York, where his case against Russo-Asiatic Bank had at the time been lodged pursuant to removal proceedings (R. 251). A similar order was entered in the New York State Court (R. 251). The order in the State Court was, to be sure, stricken out in 1935, with the effect of restoring the attachment on the record at that time; but this action did not occur until after the United States had acquired its claim of title. The courts below therefore rightly and necessarily concluded that at the date of the Litvinov assignment, whatever might be the liability of Guaranty Trust Company to Russo-Asiatic Bank or its successor, the petitioner Tillman did not have an attachment lien upon the account and he could not thereafter acquire such a lien in view of the dissolution of his alleged debtor, Russo-Asiatic Bank, brought about by the Soviet decrees of 1917 (R. 225).

The conclusion thus reached below is irresistible, and the elaborate discussion in the Tillman petition of the Fifth Amendment, the full faith and credit clause, and property rights conferred by New York Law through an attachment lien skirts and evades the real point.

Moreover, as the findings show (R. 251), the 1928 order of the District Court vacating Tillman's attachment is still in force and the very claim asserted by Tillman that the State Court order of vacatur was in 1935 set aside retroactively (R. 251; petition in No. 247 p. 10), is based upon a proposition quite inconsistent with a valid attachment or a valid default judgment, i.e. the proposition that the attorneys who appeared for Russo-Asiatic Bank on the order vacating the attachment themselves had no authority (R. 251) because Russo-Asiatic Bank must, in the language of the New York Court of Appeals, be recognized as "dead" after the Litvinov assignment made the Soviet decree of dissolution effective in New York. See *Issaia* v. *Russo-Asiatic Bank*, 266 N. Y. 37, 43 (1934).

As a last and controlling reason why the Tillman petition should not be entertained, we may mention the fact that as between Tillman and Guaranty Trust Company it is conclusively adjudicated that enforcement of the attachment lien, if it existed, is prevented by the New York statute of limitations. See R. 252; *Tillman* v. *Guaranty Trust Company*, 276 N. Y. 663.

POINT II

The Petition of the Receivers Steingut and Blodgett in No. 245 presents no issue worthy of review in this Court and should be denied.

The claim of the receivers to a review, while more elaborately presented, is subject to the same fatal defect, as was pointed out by the courts below; viz. that the receivers were appointed in 1936 and derive title from a judgment entered in 1938, in both instances long after the rights of Russo-Asiatic Bank which these petitioners seek to enforce had, under Soviet law, passed to the State of Russia and through Russia to the United States. See the discussion of the District Court at R. 3077, 58 F. Supp. at 633. The fact that the receivers were in 1939 substituted for Russo-Asiatic Bank as plaintiffs in the above-entitled action which had been instituted by the Bank in 1919, is without significance, since this substitution was expressed to be without any implication as to the merits of their claim or the quality of their title (R. 230), and since obviously the receivers are not statutory successors of the Russian bank, but only would-be liquidators of assets outside the corporate domicile.

As against this essential basis of the decision below, the receivers' petition and brief present two claims for consideration here. In the first place, they say that as a matter of proper construction of the Soviet decrees, these decrees did not take assets of Russo-Asiatic Bank in New York (petition in No. 245 p. 22). In reply it is submitted that the contrary construction put upon the Soviet decrees by the courts below whereby the Russian State became the universal successor of the Bank and all its assets every-

where went to the State (R. 225-6; R. 3072, 58 F. Supp. at 632) is the only possible construction on the face of the decrees and on the evidence, as well as being the normal and logical result under any legal system of the dissolution and merger into the State of the corporate entity of Russo-Asiatic Bank.

In the second place, these petitioners urge that, even if the construction of the Soviet decrees made by the courts below were correct, those decrees should not be given effect to transfer to the United States the accounts with Guaranty Trust Company because of the Federal public policy against extra-territorial application of foreign confiscatory or penal laws. This subject is discussed, and this ground is asserted by us as independent basis for review, in our petition in the separate actions of the United States, Nos. 239 and 240 (brief p. 27). However, the receivers as petitioners do not stand in the same position as Guaranty Trust Company with reference to the assertion of this public policy.

Guaranty Trust Company as petitioner asserts the claim of right of an American national (R. 223) by virtue of a set-off which it made against the accounts in suit in 1918 (R. 243-5). The receivers occupy no such position. While they purport to assert the rights of American creditors (petition in No. 245 pp. 11 ff.),[1] they are not creditors in their own right; they act under appointment of a court outside the corporate domicile subsequent to the Litvinov assignment; and the inconsistency of their claim as would-be liquidators with the claim of the United States as statu-

1 In fact one of the principal claims they seek to represent is of Chinese nationality, as conceded in the petition at p. 15; while another is that of National City Bank, and is not conceded by that American national to be in reality represented by the receivers and has been held by the State Court to be adverse and superior to the claim of the receivers. *Grant* v. *Steingut*, Supreme Court, Richmond County, New York Law Journal March 17 1942 (not officially reported).

tory successor, has already been pointed out by this Court. In *United States* v. *Pink,* 315 U. S. 203 (1942), these very petitioners filed a brief as friends of the Court in which they advanced contentions similar to those now asserted in No. 245 and with respect to which this Court said, in upholding the title of the United States (p. 231) with citation of New York Civil Practice Act, §977-b:

> "Enforcement of New York's policy as formulated by the *Moscow* case would collide with and subtract from the Federal policy, whether it was premised on the absence of extraterritorial effect of the Russian decrees, the conception of the New York branch as a distinct juristic personality, or disapproval by New York of the Russian program of nationalization."

Plainly, the receivers petitioners in No. 245 are mere custodians or stakeholders like the defendant Bank in *United States* v. *Belmont,* 301 U. S. 324. They have no right or title of their own, and cannot invoke here the protection of Federal public policy in the same way as Guaranty Trust Company, petitioner in Nos. 239 and 240.

An independent ground for denial of certiorari to the receivers is that their only claim of title rests upon a judgment entered in 1938 in an action set up as one *quasi in rem,* and that such judgment is necessarily void because of the prior dissolution of the defendant Russo-Asiatic Bank. *In re Peer Manor Building Corporation,* 134 F. (2d) 839, 840, cert. den. 320 U. S. 211. The point is illustrated in the present context by the decision of the House of Lords in *Lazard Brothers & Co.* v. *Midland Bank* [1933] A. C. 289, affirming [1932] 1 K. B. 617. In that case the Court dismissed an attachment upon the funds of Moscow Industrial Bank on deposit with the Midland Bank which had been obtained in 1930 and made the basis of a default judgment. Lord

Wright, [1933] A. C. at 296, points out that a judgment must be set aside as a nullity as soon as it is shown that the judgment-debtor was at all material times non-existent and that for similar reasons a garnishment based on the mailing of a summons is void.

POINT III

The fact that Guaranty Trust Company is entitled to the writ of certiorari pursuant to its Petition in Nos. 239 and 240, is no reason for granting the Petitions sought by Tillman, Steingut and Blodgett.

As has been said, the three actions against Guaranty Trust Company, i.e. the above-entitled suit in equity for an accounting which was dismissed and the subsequent actions at law by the United States in which a recovery was directed, were tried together and made the basis of common findings and conclusions. The record to which reference is here made is the combined record in the Court of Appeals made upon consent of counsel. Yet separate judgments were entered in the three cases, and their separation has always been recognized, for the reasons expressed in *Johnson* v. *Manhattan R. Co.*, 289 U. S. 479, 496.

It has just been shown that neither the petition of the receivers nor that of Tillman raises any question of substance or of general interest. In fact, neither petition shows that the adverse result is in conflict with the law of any other Circuit or with the law of this Court. The fact that in Nos. 239 and 240 we have stated questions in respect of which the decisions below are in conflict with the law of this Court and the law of New York, does not authorize the issuance of writs in the separate case above entitled. The presentation and consideration of the questions raised in

Nos. 239 and 240, will be facilitated by the denial of the writs prayed in the instant case, just as the presentation and consideration of these questions below was impaired and confused by the injection of the unmeritorious points discussed in the receivers' and Tillman's petitions.

CONCLUSION

No important question of federal law and no inconsistency of decision either with this Court or with other circuits are presented in Nos. 245 and 247, and the writs therein prayed should therefore be denied.

Respectfully submitted,

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Attorneys for
Guaranty Trust Company of
New York.

New York, September 9, 1947.

In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 245

IRWIN STEINGUT AND HAROLD E. BLODGETT, AS RECEIVERS OF THE ASSETS IN NEW YORK OF RUSSO-ASIATIC BANK, PETITIONERS

v.

GUARANTY TRUST COMPANY OF NEW YORK, JAMES A. TILLMAN, JESSE C. MILLARD AND UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

This is a companion case to *Guaranty Trust Co. v. United States,* Nos. 239 and 240. The facts are set forth and the issues discussed in the Government's Brief in Opposition in those cases.

The petitioners herein, the receivers for the Russo-Asiatic Bank appointed pursuant to Section 977-b of the New York Civil Practice Act, are seeking review of the judgment below which held that they were not entitled to the deposits in the Guaranty Trust Company which formerly stood to the credit of the Russo-Asiatic Bank. The receivers' action below was consolidated for trial purposes with the suits by the United States against the Guaranty Trust Company for the re-

covery of the same deposits. The district court made one set of findings of fact applicable both to the receivers' action and to those of the United States; the cases were argued together in the court below; and that court entered but one opinion affirming the judgments of the district court.

With respect to the receivers' claim, the lower courts held that (1) the Soviet banking decrees were intended to have extraterritorial effect (R. 3064, 3072–3075), (2) by virtue of the recognition of the Soviet Union and the Litvinov Assignment, the United States succeeded in November 1933 to Soviet Russia's title to the Russo-Asiatic credit balance in Guaranty Trust Company (R. 3064, 3076); (3) when the receivers were first appointed in 1936, and at all times thereafter, Russo-Asiatic had no assets in New York, and the receivers consequently "took nothing by their appointment", which was limited in terms to Russo-Asiatic's property in New York (R. 3065, 3076–3077); (4) if the appointing orders nevertheless be read to encompass the instant accounts, they necessarily rest on the nonrecognition of the Soviet nationalization decrees and therefore conflict with *United States* v. *Pink*, 315 U. S. 203 (R. 3065, 3077–3080); and (5) in any case, the New York statutory scheme for distribution of assets to Russo-Asiatic's creditors contravenes the federal policy which the *Pink* case declares paramount (R. 3065, 3077–3080).

We submit that these holdings of both courts below and their rejection of the receivers' claim are correct, and that the decision of this Court in *United States* v. *Pink, supra,* is completely dispositive of the questions which petitioners seek to raise in the instant case, particularly in view of the undisturbed finding below that Russo-Asiatic was never authorized to do and never did business in the United States (R. 224, 3065, 3078), and the local authority holding ineffective attachments issued against Russo-Asiatic, even prior to recognition. *Issaia* v. *Russo-Asiatic Bank,* 266 N. Y. 37.

For the reasons set forth more fully in our Brief in Opposition in Nos. 239 and 240, the petitions in all the *Guaranty Trust Company* cases should be denied. Nevertheless, we believe that, should this Court grant certiorari in Nos. 239 and 240, certiorari should also be granted in the instant case in order that this Court will have before it all the parties and all the contentions which were before both courts below.[1]

PHILIP B. PERLMAN,
Solicitor General.

SEPTEMBER 1947.

[1] The United States is filing a conditional cross-petition in the receivers' action (No. 315) asking that if the petition in the *Guaranty Trust Company* case be granted this Court also review that part of the holding of the courts below in the receivers' action which denied the motions of the United States for substitution and consolidation.

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